ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Norma McCorvey, formerly known as JANE ROE,	§	
	§	
Plaintiff,	§	**CIVIL ACTION No. 3:03-CV-1340-N (formerly 3-3690-B and and 3-3691-C)**
	§	
v.	§	
	§	
WILLIAM "BILL" HILL, Dallas County District Attorney,	§	
	§	
Defendant.	§	

BRIEF
IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER DENYING RULE 60 MOTION FOR RELIEF FROM JUDGMENT

TO THE HONORABLE COURT:

NOW COMES, NORMA MCCORVEY, Plaintiff herein, and in support of her Motion for Reconsideration of Order Denying Rule 60 Motion For Relief From Judgment, would show the Court the following legal argument and authority:

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I. THE COURT FAILED TO FOLLOW PROPER *AGOSTINI* PROCEDURE FOR DEALING WITH SUPREME COURT PRECEDENT SUCH AS *ROE*.

In *Agostini v. Felton, 521 U.S. 203 (1997)*, the United States Supreme Court ruled that a Rule 60(b) Motion was the appropriate mechanism for reopening a case and bringing it back to the United States Supreme Court to change one of its own precedents. It is the most controlling precedent in this case. The Court specifically stated, "the doctrine of *stare decisis* does not preclude us from recognizing the change in our law and overruling *Aguilar* [the Court's own prior decision at issue in the case] and those portions of *Ball* inconsistent with our more recent decisions. As we have often noted, '*stare decisis* is not an inexorable command . . .'" 521 U.S. at 203. *Stare decisis* does not prevent this case from being reopened, even thirty years later.

The Court in *Agostini*, specifically stated:

> Nor does the 'law of the case' doctrine place any additional constraints on our ability to overturn *Aguilar*. Under this doctrine, a Court should not reopen issues decided in earlier stages of the same litigation. (Citation omitted.) The doctrine does not apply if the court is 'convinced that [its prior decision] is clearly erroneous and would work a manifest injustice.' 521 U.S. at 236.

To determine if the Court's prior decision in this case is clearly erroneous and would work a manifest injustice, *Agostini,* it is necessary for there to be a thorough hearing and development of an adequate record at a bench trial in order for the Court and the Supreme Court to make a fully informed, intelligent and well-reasoned decision. It is extremely important for the Supreme Court to have an adequate record.

Norma McCorvey, the original "Roe" of *Roe v. Wade*, is alleging both (1) a change in factual conditions and (2) a change in law which make it no longer just to

continue the prospective application of *Roe v. Wade* and *Doe v. Bolton* under F.R.C.P. 60(b). With respect to the factual allegations, there must be a factual determination made, an opportunity for the presentation of evidence, and the development of a full record. The Supreme Court does not conduct its own factual hearings. The Supreme Court must rely upon the lower courts with their fact finding expertise to develop a proper record for the Supreme Court. In both *Webster v. Reproductive Services*, 492 U.S. 490 (1989) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Supreme Court made extensive references to the record in reviewing *Roe v. Wade*.

With respect to the allegations of a subsequent change in decisional law, no hearing is necessary and that aspect of the Motion can be dealt with on Motions and Memorandums of Law. In fact, the Supreme Court has said that neither this trial court, nor the Court of Appeals have the actual authority to overturn its *Roe v. Wade* decision merely on the basis of a change in law, as opposed to a factual change. The United States Supreme Court stated:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that 'if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.' *Rodriguez de Quijas*, 490 U.S. at 484. Adherence to this teaching by the District Court and the Court of Appeals in this case does not insulate a legal principle on which they relied from our review to determine its continued vitality. The trial court acted within its discretion in entertaining the Motion with supporting allegations, but it was also correct to recognize that the Motion had to be denied unless and until this Court reinterpreted the binding precedent. 521 U.S. 203 at 237-38.

This was applicable only to the legal interpretation of subsequent Supreme Court

decisions, not the factual underpinnings of the case. This protects the institutional integrity of the judiciary and the principle that lower courts should follow higher court decision. However, the lower court has a more expanded role in factual determinations. In *Agostini*, the Court determined that the factual situation had not changed significantly from the time of the original injunction. The *Agostini* Court stated,

> We agree with Respondents that Petitioners have failed to establish the significant change in factual conditions required by *Rufo*. Both Petitioners and this Court were, at the time *Aguilar* was decided, aware that additional costs would be incurred if Title I services could not be provided in parochial school classrooms. 521 U.S. at 216.

In *Agostini*, that factual conclusion was based on a fact record developed at the trial court level. In this case, all of the scientific evidence on the humanity of the child was simply not available to the scientific community nor the Court in 1973 until quite recently. In addition, the supporting affidavits from post-abortive women presents evidence which was impossible to have known in 1973 as on a wide-spread basis until recently. Thus, one of the threshold issues is whether the factual conditions have changed. As the Court said in *Agostini*,

> Obviously, if neither the law supporting our original decision in this litigation nor the facts have changed, there would be no need to decide the propriety of a Rule 60(b)(5) Motion. Accordingly, we turn to the threshold issue whether the factual or legal landscape has changed since we decided *Aguilar*. 521 U.S. at 216.

The "threshold issue" whether the factual landscape has changed since 1973 is obviously a factual question. Whether facts have changed is a factual question. Trial court should decide factual matters.

It may seem unusual that so much time has passed since the original judgment in

this case - - - thirty years. However, the passage of time is not a bar to a Rule 60(b)(5) Motion. In *Agostini*, the original Motion for Relief was filed ten years after the original Supreme Court decision. *Agostini* 521 U.S. at 214. It took two years for the case to reach the Supreme Court and in 1997, the Supreme Court overruled its own twelve year old precedent. *Id.* at 235. In this case, because many of the negative effects of abortion are slow to be recognized and the scientific community has been slow in recognizing these effects, this evidence is now presented for the first time. The Court of Appeals for the Sixth Circuit recently reversed a district court which held that twenty-eight years was untimely. *Charter Township of Muskegon v. City of Muskegon*, 303 F. 3rd 755 (6th Cir. 2002). Although this Court cited examples of weeks and months and not decades, both the United States Supreme Court and lower federal courts have allowed cases longer than that due to the surrounding circumstances of the case that would justify or require the granting of a Rule 60 Motion. *See e.g.*, *United States v. Columbia Artists Mg.*, 662 F. Supp. 865 (S.D.N.Y. 1987) (32 years); *United States v. Board of School Commissioners*, 128 F.3d 755 (6th Cir. 2002), (28 years); *Alliance to End Repression v. City of Chicago*, 237 F.3d 799 (7th Cir. 2001) (20 years); *United States v. Karahalias*, 205 F.2d 331 (2nd Cir. 1953) (17 years); *Railway Employees v. Wright*, 364 U.S. 642 (1961) (12 years); *Agostini v. Felton*, 521 U.S. 203 (1997) (12 years); *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992) (13 years); *Fed. Deposit Ins. Corp. v. Castle*, 781 F.2d 1101 (5th Cir. 1986) (2 years).

Norma McCorvey's claim that there has been a change in factual circumstances since 1973 requires a factual hearing. In *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992), the Supreme Court held that it is appropriate to grant a Rule 60(b)(5)

Motion when the parties seeking relief can show, "a significant change either in factual conditions or in law. 'A Court may recognize subsequent changes in either statutory or decisional law.'" (Emphasis added). *Rufo* eliminated the need for the party seeking relief to meet the onerous burden of "a clear showing of grievous wrong evoked by new and unforeseen conditions." *Rufo,* 502 U.S. at 380; *see also Railway Employees v. Wright*, 364 U.S. 642, (1961); *Pasadena City Board of Ed v. Spangler*, 427 U.S. 424 (1976). "The Court cannot be required to disregard significant changes in law or facts if it is satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong." *Railway Employees v. Wright*, 364 U.S. at 647 (1961). In *Wright,* the Supreme Court held it was an abuse of discretion not to reopen the judgment even where the party waited six years after the legal change occurred, twelve years after the original judgment. *Id.* at 651-52. Additionally, the parties were not bound by their prior agreement and representations to the Court, which answers the judicial estoppel question. *Wright* is controlling here.

The decisions of the Supreme Court in *Roe v. Wade* and *Doe v. Bolton* are obviously of tremendous national concern and importance. They remain as controversial today as they were when decided thirty years ago in 1973. The importance of the cases, and the issues raised in Plaintiff's Motion for Relief From Judgment, warrant a full and complete factual exposition of changed factual circumstances. The Supreme Court itself has recognized that the policy of *stare decisis*, "is at its weakest when we interpret the Constitution because our interpretations can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini*, 521 U.S. at 235 (*citing Seminole Tribe v FLA*, 517 U.S. 2 (1996); *Paine v. Tennessee*, 501 U.S. 808 (1991); *Saint Joseph's*

Stockyards Co. v United States, 298 U.S. 38, 94 (1936) (Stone & Cardozo, J.J., concurring and result) ("The doctrine of *stare decisis* . . . has only a limited application in the field of constitutional law.") The District Court in *Agostini*,

> recognized that Petitioners, 'at bottom,' sought 'a procedurally sound vehicle to get the [propriety of the injunction] back before the Supreme Court, "App. to Pet. Cert. in No. 96-553, Pg. A12, and concluded that the, 'Board had properly proceeded under Rule 60(b) to seek relief from the injunction.' *Agostini*, 521 U.S. at 214.

In *Planned Parenthood v. Casey*, 505 U.S. 833, 845 (1992), relying on the trial court held a three day bench trial, the Supreme Court re-examined *Roe v. Wade* for the last time. It has been thirty years since *Roe* and *Doe* were decided. It has been eleven years since *Casey* was decided. It will probably be another two years before this case reaches the Supreme Court. In addition, the factual evidence which Plaintiff will submit in the hearing on this Motion was not presented to, or considered by, the Supreme Court in *Casey*.

Casey itself, while not overturning the central premise of *Roe v. Wade*, did acknowledge that some factual changes had occurred over time. The Court stated, "we have seen how time has overtaken some of *Roe*'s factual assumptions." *Casey,* 505 U.S. at 860. Time has now even further eroded *Roe's* factual assumptions. Norma McCorvey, as the party that brought legalized abortion to America, now has the right to present new evidence that it is unjust.

The Court of Appeals for the Fifth Circuit has recently and strongly directed trial judges who do not want to hear post-judgment motions as follows:

> Accordingly, we direct the judge in this case, and others in this Circuit, to entertain post-judgment motions as contemplated by the rules. Moreover, the district courts *must carefully consider each such motion on its merits, without begrudging* any party who wishes to avail himself of the

> opportunity to present such motions in accordance with the rules of procedure and with the standards of professional conduct. (emphasis added) *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 502 (5th Cir. 2000).

Plaintiff's Motion was not based on newly discovered evidence. Such a motion must be filed within a very short time of the newly discovered evidence and may actually affect the justice or injustice of the original judgment. This Motion was based on the rarer, but still valid, grounds of changes in factual conditions and/or legal conditions that make a judgment that may have once been just at the time it was entered no longer just in light of these changed legal and factual conditions. When should such a motion be filed?

Obviously, such a Motion should not be filed at all until the factual and/or legal conditions have changed so completely as to render the original judgment completely unjust, or "manifestly wrong." *Railway Employees v. Wright,* 364 U.S. 642 (1961). Should such a motion be filed at the very beginning, the first glimmer of a factual or legal change in conditions, or are the litigants and the courts and society better served by waiting until the factual or legal conditions are fairly well established and certain in order that justice may be fully served. Keeping in mind the need to balance finality and justice, a litigant should not be penalized for waiting for factual and legal conditions to be changed substantially and permanently. Manifest means: "Evident to the senses, especially to the sight, obvious to the understanding, evident to the mind, not obscure or hidden, and is synonymous with open, clear, visible, unmistakable, indubitable, indisputable, evident and self-evident."[1] Such manifesting of the evidence and injustice has not occurred until recently.

[1] Black's Law Dictionary (rev. 4th ed. 1968).

II. THE DEVELOPMENT OF MAN'S KNOWLEDGE OF WHEN LIFE BEGINS MAKES THE MOTION TIMELY

One factual condition that has changed since 1973 is the whole state of man's scientific knowledge of the humanity of the child. Clearly, it was unknown in 1973 because the Supreme Court said so. Norma McCorvey's position is that it has not become known until quite recently with advances in scientific knowledge, but neither she nor the court can really say with exact certainty when that point in man's knowledge was crossed. This is totally unlike some of the cases cited by the district court where some bit of knowledge about fraud or some other easily established fact becomes known at some exact point of time and then the litigant must act promptly. Many still dispute the point Norma is making. She ought to have the right to try to prove her point, as she attempted to do, but only after a substantial development of medical and scientific knowledge.

III. SIGNIFICANT CHANGES IN LEGAL CONDITIONS MAKE THE MOTION TIMELY

Another major point Norma is trying to establish is a change in legal conditions. One of the most important of these is the baby safe haven laws cited in footnote 42 and 43 of the original Rule 60 Motion. Instead of all the burden of child care being on the mother, as in 1973, now the state will care for unwanted children with no questions asked. Clearly, it was not until 2003 that forty states had adopted such laws. That is a major change in the legal landscape affecting unwanted motherhood. Should Norma have filed the Motion in 1999 when the first law was passed? One law hardly constitutes a sea change in public attitudes and legal conditions. She would have lost automatically and wasted the court's time and resources. Norma can only be successful in her Motion when she demonstrates a significant change in legal conditions. It would have been

foolish and improvident to bring her Motion on such a change any earlier when it was not widespread and well established.

There have been significant legal changes that justify Plaintiff's Rule 60 Motion. As discussed in Plaintiff's Motion and Supporting Brief, the United States Supreme Court has continued to restrict and undermine the legitimacy of *Roe v. Wade*. These cases have included but not limited to *Webster v. Reproductive Services*,[2] *Planned Parenthood v. Casey*,[3] and *Washington v. Glucksberg*.[4] Even in its most recent ruling, the United States Supreme Court has recognized that "...this Court, in the course of a generation, has determined and then redetermined" what the basic constitutional protections are in the area of abortion and how they should be applied in particular circumstances.[5]

Another major legal change is the growth of Federalism. In 1973 the Commerce Clause was all powerful and the Tenth Amendment practically a dead letter. It was not until the early 21st century before the resurrection of Federalism was well established. *See* Original Rule 60, paragraphs 19 and 20. Could Norma have brought this Motion in 1995 when the first federalism case was handed down? She would have been laughed out of court on the grounds no such significant legal change had occurred. She had to wait for a substantial change to occur for her motion not to be frivolous. In *Railway Employees v. Wright,* 364 U.S. 642 (1961), the Court held it was an abuse of discretion to deny a Rule 60 motion even where the litigant waited six years from a clear legal change to file its motion, in that case a Congressional statute changing the law.

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[2] 492 U.S. 490 (1989).
[3] 505 U.S. 833 (1992).
[4] 521 U.S. 702 (1997).
[5] *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000).

IV. THE NATURE OF THE PAIN AND INJURY OF WOMEN WHO HAVE HAD ABORTIONS MAKE THE MOTION TIMELY

Finally, her Motion evidence shows that women have many reasons to avoid testifying about their pain of abortion, and it took three years to collect over 1000 affidavits. Should she have filed her Motion with the first affidavit? Of course not, she would have been laughed out of court and wasted the court's time. What court would set aside a judgment if only one or even a few women had a bad experience with abortion? The Affidavit of Allan E. Parker, Jr. also explains the difficulty of collecting affidavits. See Affidavit of Allan E. Parker, Jr., Motion For Reconsideration, Appendix, Tab A.

Out of respect for the court and the judicial process, she collected a great deal of evidence to show the court that in reality, both factually and legally, had changed, not just Norma's opinions about abortion. Her opinion is not the controlling point, though it is relevant, it is primarily the evidence of the changed factual and legal conditions. That evidence of significant change in legal and/or factual conditions has clearly been presented within a reasonable time, in fact, further delay would still have been reasonable because more evidence is accumulating daily. A litigant should not be penalized in this type of case for waiting for dramatic and clear changes in legal and factual conditions before bringing such a serious type of motion as to justify overturning a major Supreme Court decision. Respect for the judiciary demands ample evidence and ample time for reflection.

V. REASONABLE TIMELINESS DEPENDS ON PARTICULAR CIRCUMSTANCE

The Motion must be brought within a "'reasonable time' ... which depends upon

the particular facts and circumstances of the case."[6] Thus, the court cannot apply a strict time limitation as the "particular facts and circumstances" of each case will be different, thereby requiring an analysis of when those facts and circumstances changed. Without making that assessment, this Court concluded that based merely on the passage of time that Plaintiff's Motion "was not made within a reasonable time due to the length of time alone."[7] Plaintiff respectfully submits that this was error.

The United States Supreme Court has rejected the mere passage of time as the standard when there have been significant changes in law or facts.[8] Most recently the Sixth Circuit rejected the argument that twenty-eight years is too long. *Charter Township of Muskegon v. City of Muskegon*, 303 F.3d 755, 760 (6th Cir. 2002) (*citing Coaltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 271 (3rd Cir. 2002)). "The court cannot be required to disregard significant changes in law or fact if it is satisfied that what it has

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[6] *Traveler's Ins. Co. v. Liljeberg Enterprises, Inc.*, 38 F.3d 1404, 1410 (5th Cir. 1994); *Margoles v. Johns*, 798 F.2d 1069, 1073 (7th Cir. 1986); *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 931 (5th Cir. 1976); *In re Pacific Far East Lines, Inc.*, 889 F.2d 242 (9th Cir. 1989).

[7] Order Denying Rule 60(b) Motion at 6 (June 19, 2003).

[8] Although this Court cited examples of weeks and months and not decades, both the United States Supreme Court and lower federal courts have allowed cases longer than that due to the surrounding circumstances of the case that would justify a Rule 60 Motion. *See, e.g., Agostini v. Felton*, 521 U.S. 203 (1997)(12 years); *Rufo Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992)(10 years) *Railway Employees v. Wright,* 364 U.S. 642 (1961) (12 years); *United States v. Karahalias*, 205 F.2d 331 (2d Cir. 1953)(17 years); *Federal Deposit Ins. Corp. v. Castle*, 781 F.2d 1101 (5th Cir. 1986)(2 years) Although this Court cited examples of weeks and months and not decades as prohibitive, both the United States Supreme Court and lower federal courts have allowed cases longer than that due to the surrounding circumstances of the case that would justify a Rule 60 Motion. *See, e.g., Agostini v. Felton*, 521 U.S. 203 (1997)(12 years); *United States v. Board of School Commissioners*, 128 F.3d 507 (7th Cir. 1997)(30 years); *Rufo Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992)(10 years); *Railway Employees v. Wright*, 364 U.S. 642 (1961)(12 years); *Charter Township of Muskegon v. City of Muskegon*, 303 F.3d 755(6th Cir. 2002)(28 years); *Alliance To End Repression v. City Chicago*, 237 F.3d 799 (7th Cir. 2001)(20 years); *United States v. Karahalias*, 205 F.2d 331 (2d Cir. 1953)(17 years); *Federal Deposit Ins. Corp. v. Castle*, 781 F.2d 1101 (5th Cir. 1986)(2 years); *United States v. Columbia Artists Mg.*, 662 F. Supp. 862 (S.D.N.Y. 1987)(32 years). In desegregation cases, the federal courts have also granted relief from decrees issues decades ago due to changes in social and factual conditions. *See, e.g., Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305 (4th Cir. 2001)(30 years); *People Who Care v. Rockford Board of Education*, 246 F.3d 1073 (7th Cir. 2001) (30 years); *Manning v. School Board of Hillsborough*, 244 F.3d 927 (11th Cir. 2001)(30 years); *NAACP v. Duval County School*, 273 F.3d 960 (11th Cir. 2001)(41 years); *United States v. Texas*, 158 F.3d 299 (5th Cir. 1998)(27 years); *Lee v. Butler County Board of Education*, 183 F. Supp. 2d 1359 (M.D. Ala. 2002)(39 years); *Ruiz v. Johnson*, 154 F. Supp. 2d 975 (S.D. Tex. 2001)(20 years).

been doing has been turned through changed circumstances into an instrument of wrong."[9] In fact, a "court errs when it refuses to modify an injunction or consent decree in light of such changes."[10] Therefore, lapse of time is not determinative,[11] but the court must make a flexible application depending on the facts of each case.[12]

VI. VALID REASONS FOR DELAY WERE GIVEN

Courts have denied Rule 60 motions which could have been brought earlier, but the movant gave no valid reasons for delay.[13] Unlike these cases, Plaintiff gave substantial evidence in its Original Motion and Supporting Brief on why it would not have been reasonable to file this Motion sooner.[14] Her entire Motion is based on the assertion of changed circumstances which necessarily implies the passage of time.[15]

Alternatively, this Court rejected Plaintiff's Motion asserting that the issue was not pled and proven. However, throughout the Motion and Supporting Brief, Plaintiff details the changes in both factual and legal conditions that have occurred. These changes have occurred as recently as 2003. For example, one factual condition that has changed since 1973 is the whole state of man's scientific knowledge of the humanity of the child.

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[9] *Agostini,* 521 U.S. at 215 (*quoting Railway Employees v. Wright*, 364 U.S. 642, 647 (1961)).
[10] *Id.*
[11] *Margoles v. Johns*, 798 F.2d 1069, 1073 (7th Cir. 1986) (stating the lapse of specific period of time between entry of judgment and ruling of the motion for relief is not determinative but depends on the circumstances)
[12] *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928 (5th Cir. 1976) (stating reasonable time by its nature invites flexible application depending upon the facts in each case).
[13] *See, e.g.*, *Farm Credit Bank of Baltimore v. Ferrera-Goitia*, 316 F.3d 62, 66 (1st Cir. 2003) (looking at six year delay between entry of default judgment and bringing Rule 60 motion without movants offering reason for delay) *First Republic Bank Fort Worth v. Norglass, Inc.*, 958 F.2d 117, 119 (5th Cir. 1992) (Plaintiff had sixty days to appeal the decision, but did not take steps to do so).
[14] Plaintiff repeatedly requested an evidentiary hearing on all aspects of her Rule 60 Motion. This obviously would include the reasonable timeliness as well as all other issues that would be relevant to a Rule 60 Motion hearing. There were no single requests for hearings on such issues as standing, mootness, reasonableness, new scientific evidence, new evidence that abortion hurts. A single hearing was requested ~~which would obviously handle all issues in a Rule 60 Motion, particularly in light of the fact that there was~~ no opposition from any party who was objecting on any basis to the Motion
[15] *Clark v. Burkle*, 570 F.2d 824 (8th Cir. 1978) (denying hearing is abuse of discretion and noting that "this is not an ordinary run of the mill piece of litigation").

Clearly, it was unknown in 1973 as even the United States Supreme Court recognized in *Roe*.[16] Plaintiff's position is that it has not become known until quite recently, with advances in scientific knowledge; but neither she nor the court can really say with exact certainty when that point in man's knowledge was crossed. This has been an evolving process with an explosion of medical and scientific knowledge as well as advances in technology in recent years.

a) Practical Ability Of The Litigant To Learn Earlier Of Grounds Relied On

The first factors in determining what is a reasonable time of "the practical ability of the litigant to learn earlier of the grounds relied upon." *Travelers Ins. Co. v. Liljeberg Enterprises, Inc.*, 38 F.3d 1404, 1410 (5th Cir. 1994). Norma McCorvey is a poor, uneducated person, with very little formal education. *See* Affidavit of Norma McCorvey, Appendix, Tab A, page 1-14. She did not have the practical ability.

b) There Is A Lack Of Prejudice To The Other Side

The second factor is prejudice to other parties. *Travelers Ins. Co. v. Liljeberg Enterprises, Inc.* 38 F.3d 1404 (5th Cir. 1994). There is, of course, no prejudice to the District Attorney Dallas County since Norma McCorvey is now agreeing with his position in the lawsuit that he has the authority under the Constitution to prosecute under the Texas Criminal Abortion Statute. In fact, the Dallas County District Attorney's Office has neither agreed to nor opposed the Motion. If the interest of his office were adversely affected, he would have opposed the Motion.

The same is true for the State of Texas. They are certainly not prejudiced by

[16] ~~The Court stated: "We need not resolve the difficult question of when life begins. When those trained~~ in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus,

having a former adversary adopt the position of the State of Texas that it has authority to protect women and children from abortion. The interests of the adverse parties are actually advanced rather than being prejudiced.

c) Balancing Finality Versus Justice

The third factor is the court's interest in finality. *Travelers Ins. Co. v. Liljeberg Enterprises,Inc.*, 38 F.3d 1404 (5th Cir. 1994). It is certainly true that there is an interest in finality in any judgment. But when a decision of the Supreme Court is involved, as opposed to the normal run of the mill litigation between private parties, the Supreme Court has made it clear the mere passage of time, even up to twelve years, is not a bar to seeking justice. Justice trumps the interest and finality. *Agostini v. Felton,* 521 U.S. 203 (1997).

If the evidence sought to be introduced by Norma McCorvey is in fact true that abortion seriously injures women, then clearly the fact that abortion is hurting and injuring women can outweigh any interest that the Court might have in the finality of its judgment. If finality were the sole key, we would still have segregation in this country under *Plessy v. Ferguson's* doctrine of separate but equal.

The Court violated Norma McCorvey's rights to due process which fundamentally constitute notice and an opportunity to be heard on the issue of timeliness. Norma requested a full hearing on all of her evidence, submitted 5,437 pages of evidence, yet the Court decided Norma's motion in two days, without giving the other parties an opportunity to respond and without giving Norma an opportunity to respond. If the normal course of litigation had ensued, the State of Texas and the District Attorney

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the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Roe v. Wade*, 410 U.S. 113, 181 (1973).

would have had twenty days to respond. *See* Local Rule 7.1(e). If either party had raised the issue of unreasonableness of timeliness, Norma would have had 15 days to respond to their attack with replies, including argument and affidavits if necessary. *See* Local Rule 7.1(f). With all due respect to the Court, the Court could not have reviewed 5,437 pages of evidence, with highly technical and scientific matters, in two days. The Court acknowledges as much when it indicates there is really not a need for an evidentiary hearing since in the Court's opinion, the mere passage of thirty years is a bar to the Motion for Relief From Judgment.

In Plaintiff's Affidavit, Appendix to Original Motion, Tab A, p. 1-14, Plaintiff had no personal knowledge of what went on in abortion clinics until 1992. She began to work in clinics and the experience began to bother her conscience. However, this was only her own personal experience at the time. She did not have widespread experience. It is doubtful that Norma McCorvey's personal opinion about what occurred in a few abortion clinics in Dallas would convince the Supreme Court that the *Roe v. Wade* decision was unjust. In the year 2000, Norma, through her attorneys, began to talk to and collect evidence from hundreds of women who had been in abortion clinics throughout the United States. *See* Affidavit of Allan Parker, Appendix, Tab A. She found a widespread basis for informing the Court that women were not adequately informed of the nature of abortion; that they were not adequately informed of the consequences of abortion, Brief Page 34; that abortion severely affected women psychologically, Brief Page 38; that women would counsel other women not to have abortions based on the evidence that they had, Brief Page 40; and that women were often pressured into having abortions and that it was not a woman's choice, Brief Page 43. Reviewing the affidavits

of more than one thousand women which were attached to the Motion, shows the dates of the affidavits vary between 2000, 2001, 2002, and 2003. Plaintiff should not be penalized for attempting to collect evidence on a widespread basis to present to the Court. Is it unreasonable for Norma McCorvey to want to present a large volume of evidence to the Court of an issue of such importance nationally and one that is so important to women?

VII. THIS COURT LACKED JURISDICTION TO ENTER ITS ORDER FILED JUNE 19, 2003 DENYING PLAINTIFF'S MOTION FOR IMPANELMENT OF A THREE-JUDGE COURT, AND A FACT HEARING ON ALL MATTERS PERTAINING TO THE RELIEF SOUGHT

This Court denied Plaintiff's application for impanelment of a three-judge court, denied the Plaintiff an evidentiary hearing, and denied the Plaintiff's Motion, effectively entering a final order which adjudicates the entire matter. In reaching this decision, and entering the Order only two days after the 5,437 pages of evidence was filed, the Court did not give the Plaintiff an opportunity to be heard even at an oral argument for purposes of giving the Plaintiff the opportunity to be heard on the Court's concerns about the passage of time between the judgment thirty years ago and the filing of this Motion.

a. The Statute This Court Relied Upon In Reaching Its Conclusion That It Had Jurisdiction To Act As A "Single Judge" Only Applies To Judges Of A Three-Judge Court Already Impaneled - It Did Not Confer Jurisdiction On It To Act Before The Panel Was Assembled.

Under normal circumstances anticipated by the Statute requiring a three-judge court, this case would not have been submitted for random assignment to a single judge. It would have been sent to the three-judges who originally heard the case. The reason the clerk assigned it out on a random selection basis because the three-judges who heard this case are no longer on the Court. The only proper function of the new judge was to make

a request to the Chief Judge of the Court of Appeals for the Fifth Circuit to reconstitute the three-judge court in order for the Court to reconvene.

This Court treated the application in an inconsistent fashion. The Court asserts, on the one hand, that it is the discretion of a judge to decide if a three-judge court should be convened, as if the prior determination to convene a three-judge court had never been made in this case; but expressly relied upon, 28 U.S.C. §2284, which recognizes limited jurisdiction of a single judge who is already a member of a three-judge court already impaneled.

The Court erred and did not have the assumed jurisdiction.

Section 2284, relied upon by the Court (*see* Order P.2, L14 to P. 5 L.2) reads as follows:

> Any one of the three-judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before the final hearing.

It is clear from the plain language of the Statute that the "single judge" given the power to "enter orders permitted by the rules of civil procedure" refers exclusively to one of the three judges of a three-judge court already impaneled. This is clear from the language of the first sentence: "Any one of the three judges of the court may...". It is also clear from the last sentence which requires appeals from orders entered by a single judge "reviewable by the full court at any time before the final hearing." The Statute anticipates participation by the entire panel in both assigning the matter to a single judge and involvement in reviewing the action taken by a single member of the three-judge

court in the event the litigants assert error. The power of the single judge is anticipated to concern only those matters that "arise before the final hearing".

This Motion for Reconsideration highlights the very problem created by the District Court's action without reconvening of the panel. Although this Court asserts that it is acting under the authority of Section 2284, there is no three-judge court to which Plaintiff can submit an application for review. A motion under Rule 59(e) to the District Court Judge seeking correction of procedural and substantive errors is most appropriate.

This construction of the Statute is precisely the holding in *Page v. Bartels,* 248 F.3d 175 (3rd Cir. 2001). In *Page*, the Court of Appeals made it clear that the section of the Statute that sets forth the powers of a "single judge", §2284, is "necessarily interdependent" with the section of the Statute which requires the impanelment of the three-judge court in the first instance, §2281. "The constraints (and authority) imposed by §2284(b)(3) on a single district judge's authority to act are not triggered unless the action is one that is required, under the terms of §2284(a), to be heard by a District Court of three judges." *Page*, 248 F.3d at 185. Thus, no single judge has the authority to act under § 2284 unless the court has been impaneled pursuant to § 2281. Although *Page* construed the language of the current Three-Judge Panel Statute dealing with appointment cases, the relevant language of those Statutes are identical to that of §2281 and §2284 from 1970 which controls this case.[17]

Simply put, without the actual impanelment of a three-judge court under §2284, there exist no judges who can act as a "single judge" of that three-judge court who can

[17]In footnote 5 of this Court's Order, the Court cites to a footnote in a secondary authority, Wright & Miller, FEDERAL PRACTICE AND PROCEDURES §4235 at 624 n.69. Although this does not cite a single case referenced in that footnote, it treats the cases in that footnote for its authority that it has jurisdiction to take action on a "post-judgment matter". A review of the cases cited by Wright and Miller reveal otherwise.

"enter all orders...permitted by the rules of civil procedure." Thus, this Court had no authority to act under §2284.

b) This Court Did Not Possess Jurisdiction To Dismiss The Plaintiff's Rule 60(B)(5) Motion On Authority Other Than §2284.

Although this Court expressly stated that it relied solely on §2284 for its jurisdictional authority, no other ground exists which gives it jurisdiction to dismiss the Plaintiff's motion.

This Court's reasoning in the order is of the function usually associated with a judge to whom a new case is assigned for referral to the Chief Justice of the Court of Appeals for impanelment of a three-judge court. To that end, this Court assumed it possessed the authority to refuse to refer the case to the Chief Justice. Refusal to refer the case is not a power of a single judge under §2284. The question of whether a District Court can refuse to refer the case to the Chief Justice only arises when the case is first filed. The question of whether a three-judge panel should be referred does not, by definition, arise in a case for post judgment relief on a judgment entered by a three-judge court. Only the three-judge court can hear the motion on the merits.

Even if, in theory, a judge not a member of a three-judge court had the authority to refuse to refer the case to the Chief Judge for reconvening or reconstitution of an old court, the judge does not have jurisdiction to refuse to refer the case for the reasons set forth by this Court.

When an application is made in a new case (which this is not) to a District Court Judge to refer the case to a three-judge court, that single judge's power is strictly limited.

Each of them are cases where the judge to whom matters were assigned - either by the three-judge court or a Circuit Court- was a member of an actual three-judge court which had been convened.

In *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962), the United States Supreme Court held that:

> When an application for a statutory three-judge court is addressed to a District Court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the Plaintiff at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute." *See Holiday Magic, Inc. v. Warren*, 497 F.2d 687, 691 (7th Cir. 1974) (*quoting Idlewild*).

Each of those considerations were already reviewed and the decision to impanel the three-judge court made in this case. None of these considerations are now even before this court because they were all clearly established in this case, and even acknowledged by this Court's own observations. That, of course, is one reason why a non-member of the three-judge court has no jurisdiction in the matter at all, except to send the case to the Chief Justice for assignment. But *Idlewild* makes it clear that the kind of substantive overview this Court made is not one that can be made by a District Court Judge even if the question of entitlement to a three-judge court was being reviewed for the first time. A judge sitting alone cannot make a ruling which encroaches on the substance or merits of the underlying application, whether it is under §2284 as single judge cannot enter "final judgment" or "dismiss the action", or upon an initial application for a three-judge court.

Here, this Court ruled that the Plaintiff's Rule 60(b)(5) Motion was filed in "an unreasonable" time. That finding (without an opportunity for Plaintiff to be heard, or a review of the reasons why the facts were not prviously available to Plaintiff) was effectively a ruling on the merits of the motion because the "practical inability of the litigant to learn earlier of the grounds relied upon" Rule 60(b) is inextricably connected to

the grounds for the relief itself. Plaintiff's motion relied upon new facts - some of which did not exist before and others which were totally undiscoverable - and new law that made it impractical, if not impossible, to bring the motion before this time.

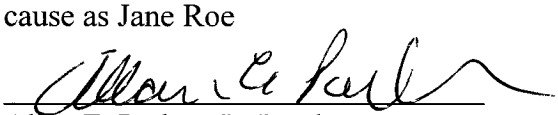
That standard is discussed at length under Point II.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Norma McCorvey prays that the Court should grant the Motion for Reconsideration.

Respectfully Submitted,

THE JUSTICE FOUNDATION
(Formerly Texas Justice Foundation, and still doing business in Texas as the Texas Justice Foundation)
Attorneys for Plaintiff Norma McCorvey, formerly known in this cause as Jane Roe



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CERTIFICATE OF SERVICE

A true copy of the above and forgoing has been hand-delivered to: The Texas Attorney General, 300 W. 15th Street, Austin, Travis County, and the District Attorney for Dallas County, Frank Crowley Courts Building, 133 N. Industrial Blvd., LB 19, Dallas, Dallas County, Texas.

SIGNED on this the 3rd day of July, 2003.

Allan E. Parker, Jr.

CERTIFICATE OF CONFERENCE

I hereby certify that I contacted the office of Bill Hill, District Attorney for Dallas County, Texas on June 30, 2003. Bill Hill's Office stated that he neither agreed to or opposed the Motion.

On three separate working days since the Order of June 19, 2003, Plaintiff's counsel has left telephone messages with Attorney General Greg Abbott's scheduler or Texas Solicitor General Ted Cruz requesting a consultation concerning this Motion for Reconsideration, either in person or by telephone. Such a request was made for the last time on July 2, 2003, the day before the Motion was due. Plaintiff's counsel has received no response from the State of Texas at this time. Texas Solicitor General Ted Cruz was consulted prior to the original Rule 60 Motion and took the position that the State was not a party.

SIGNED on this the 3rd day of July, 2003.

Allan E. Parker, Jr.